

Sequestration Group Appeal - Hospice Fact Sheet

(Complete One Sheet for Each Distinct Provider Number)

Corporate name, dba, state of incorporation, and address:
Entity Type (for profit, not for profit):
Medicare Provider Number/Provider Location/Date of Medicare Cert.:
Current Patient Census (this provider number):
Medicare Fiscal Intermediary:
Is Hospice on Pro-Rated or Streamlined Method: If Pro-Rated, please state cap accounting year of first application of Pro Rated method:
2013 and/or 2014 Sequestration Amount: Multiply by 10%: _____ (if less than \$2,000, then initial fees = 2,000) (if greater than \$2,000, then pay this as initial fees)
Does Hospice have any current outstanding repayment plans to HHS, whether for cap or post payment audit, or other matters? If so, please provide details:
Identity of Owners (5% Interests or more):
Designated Authorized Representative: Name/Title: Work and Cell Phone Numbers: E-mail Address:

Date: _____

I certify that the foregoing information is correct.

(Designated Authorized Representative)

[PLACE ON HOSPICE LETTERHEAD AND SIGN]

DO NOT MAIL TO PRRB / RETURN TO SHEPPARD MULLIN

Provider Reimbursement Review Board
Division of Jurisdiction and Case Management
2520 Lord Baltimore Drive, Suite L
Baltimore, MD 21244-2670

DATE

Re: **NAME OF HOSPICE**; Provider No.: __-____
Fiscal Year: 11/1/13 – 10/31/14
Appointment of Legal Representative

To whom it may concern:

Please take notice that **NAME OF HOSPICE**, appellant in this matter, hereby appoints Brian M. Daucher and Doug Luther of the firm of Sheppard Mullin Richter & Hampton LLP as its legal representatives in this matter. Please direct any correspondence related to this matter to them at the following address:

Brian M. Daucher
Sheppard Mullin Richter & Hampton LLP
650 Town Center Drive, Fourth Floor
Costa Mesa, California 92626

If you have any questions, please let us know. Thank you,

PLEASE ADD SIGNATURE AND TITLE HERE

Hospice Cap Sequestration Group Appeal – Document Checklist

Before sending in your engagement letter, please be sure that you have gathered and included each of the following documents:

1. Hospice Cap Notices/Repayment Demands from Medicare Contractors (eg, Palmetto, NGS)
(for the past five years, FY 10-14, to extent received)
2. All Voluntary Cap Reports Submitted by Hospice for FY 2014 or later years
3. PS&R Summary Report for last five years (2010-2014) with period set for 11/1 to 10/31 to match cap accounting year

INCLUDE:

CMS cover letter and hospice cap calculation/computation sheet
(whether showing surplus OR repayment demand)

4. PS&R Hospice Cap Allowance Reports under Method Applicable to Provider
(Streamlined or Pro Rated)

Set to run for full dates allowed:

Beneficiary Identification Period: 8/1/07 to present

Dates of Service: 11/1/07 to present

5. Signed PRRB Authorized Representative Statement
(on your letterhead) (form attached)
6. Signed Sheppard Mullin engagement letter
7. Signed HIPAA Business Associate Agreement (we will return a counter-signed version to you)
8. Initial Fee and cost deposit check payable to Sheppard Mullin

PLEASE DO NOT INCLUDE:

Original documents (except PRRB Authorized Representative Statement) (copies only)

PLEASE send all documents to us, not to the PRRB

Patient-specific information (including attachments to cap demand letters with patient specific data)

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Sheppard Mullin Richter & Hampton LLP
650 Town Center Drive, 4th Floor
Costa Mesa, CA 92626-1993
714.513.5100 main
714.513.5130 main fax
www.sheppardmullin.com

Writer's Direct Line
714-424-2843
bdaucher@sheppardmullin.com

May 1, 2015

VIA E-MAIL

To:
U.S. Medicare Certified Hospices

Re: Engagement of Sheppard, Mullin, Richter & Hampton LLP

Dear Representative:

The purpose of this letter is to confirm the terms of our engagement, subject to Formation (as defined below), by your hospice _____ (name) ("You" or the "Hospice") to represent it in connection with the Group Appeal(s) related to the overstatement of certain FY 2013 and/or FY 2014 and/or subsequent hospice cap overpayment demands. Specifically, we will assert that the U.S. Department of Health & Human Services ("HHS") has overstated hospice revenue for these years, as applicable to your hospice, by including certain monies never paid to Hospice but instead sequestered pursuant to Federal law. We appreciate your confidence and thank you for considering us as counsel for the Hospice.

1. Formation. This proposal to represent You and other hospices in connection with one or more Group Appeals is expressly contingent upon the formation of a group of an acceptable size as defined in this paragraph ("Formation"). The concept of the Group Appeal is to make it economical by leveraging the size of the group; if the size of the group is too small, then it will not be economical for the Firm to proceed on the terms outlined in this letter. Based upon our prior experience, we are assuming that there will be at least 50 hospices joining the group. We expect to achieve Formation fairly quickly.

For these reasons, our full representation of You will not begin until we advise You in writing that: (a) we have achieved a group of acceptable size; and (b) we have fully formed the Group Appeal. Prior to Formation, our representation will be limited to filing a timely PRRB appeal that will at least preserve Your appeal rights related to the sequestration issue, as defined below. The mere filing of an appeal will not obligate You to proceed beyond that step, but will preserve Your rights, without further action, for well beyond the 180 day deadline. We will keep You apprized of the status of Formation and will advise You of Formation as soon as practical. If we cannot Form the Group Appeal as we anticipate, we will discuss with You the possibility of individual or other representation. If the group is not formed, we will return, upon Your request, Your Cost deposit and Initial Fee less only out of pocket, third party costs.

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2. Scope of Representation. Subject to Formation, we will represent You in relation to the filing and prosecution of both any administrative appeal and/or related court actions against HHS to challenge the hospice cap demands as overstated for inclusion of sequestration money never actually paid to the hospice. Our representation and the terms below will apply to Your FY 2013, FY 2014, and subsequent cap demands issued or required to be submitted by Hospice during the course of work to the extent that they are either: (a) overstated by the inclusion of sequestered revenue never paid to the hospice; or (b) subject to restatement to include sequestration funds under the current HHS' policy to include sequestered revenue in Hospice revenue for FY 2013, FY 2014, and subsequent years.

Except as we may otherwise agree in writing, we will represent only the Hospice and will not represent any parent, subsidiary or other affiliated entity nor any shareholder, partner, member, director, officer, employee, agent or insurer of the Hospice.

Anticipated Services: Our representation of You in the Group Appeal may include some or all of the following work: (a) review of Your cap, sequestration, and revenue history; (b) preparation and filing of one or more group appeals with the PRRB, and request for expedited judicial review; (c) preparation, filing, and prosecution of a complaint in Federal court for the District of Columbia (Washington, D.C.) or other suitable venue against HHS to challenge the validity of the HHS policy to include sequestered funds never paid to Hospice in hospice revenue for purposes of calculation of the Hospice cap and to seek relief including recalculation and/or set aside of prior repayment demands, return of or credit for prior payments made (including interest), reduction in interest charged, recovery of attorneys' fees, and other relevant relief; (d) negotiation and possible documentation of potential resolution of this Group Appeal with HHS; and (e) prosecution of any related appellate work concerning the Group Appeal.

PLEASE NOTE: Any appeal must be filed within 180 days of the date that You submit Your Hospice cap report for 2014, if it includes the sequestration money. This is a strict deadline. Given time constraints, we also cannot accept responsibility for filing a timely cap appeal (i.e., within 180 days of repayment demand) unless You return this letter along with Minimum Documents to us at least ten (10) business days ahead of the 180 day anniversary of Your repayment report.

PLEASE ALSO NOTE that in these cases we are not planning to challenge the constitutionality of the hospice cap nor to challenge any alleged miscalculations of the cap apart from the miscalculation related to inclusion of sequestered monies never paid to the Hospice. If You believe that there are other technical aspects of the cap repayment demand to You that are inaccurate, apart from the improper inclusion of sequestered funds never paid to the Hospice, we highly recommend that You address these issues immediately and directly to Your respective Medicare Administrative Contractor (e.g., Palmetto).

PLEASE ALSO NOTE that a Group Appeal, though arguably much more cost efficient, may have certain negative consequences as compared to an individual appeal, such as: (a) longer time to resolution; (b) lack of possibility of making certain provider specific

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arguments; (c) lack of possibility of individual settlements; and (d) because there may be hundreds of co-plaintiffs in this matter, communications may be primarily by email with group wide conference calls. It may also be the case that different clients have different views on how we should proceed. In the event of a conflict between clients as to strategic approach, we may be forced to withdraw from some representation. If such withdrawal is unavoidable after discussion, we would continue to represent the larger group of remaining providers.

PLEASE ALSO NOTE that in order to qualify You must either have repaid the demands in question or be current with HHS on an outstanding repayment plan. You must certify these matters in the Hospice Fact Sheet.

FINALLY, PLEASE ALSO NOTE that this litigation is uncertain. There is no guarantee that we will ultimately prevail in our challenge to the regulation or that, if we do prevail, there will be any Net Benefit to Your specific hospice.

3. Minimum Documents/Cooperation. If You want to join this Group Appeal, then You must return to us a signed copy of this engagement letter and the Initial Fee and Cost Deposit (below) as well as the following items: (a) a complete Hospice Fact Sheet in the form we provide; (b) copies of all requested cap reports, PS&R reports and other documents; and (c) a signed Representation Statement to allow this firm to represent You before the Provider Reimbursement Review Board (PRRB).

We may ask for and need additional assistance, such as work towards preparation and execution of sworn statements or additional documents or factual background. You agree to provide such assistance in a timely fashion upon request.

Also, in connection with calculating any Net Benefit, such calculation may depend upon receipt of additional information from You. You agree to respond timely to any reasonable request we make for such information.

4. Communications. We will expect You to identify a Contact Person on the Hospice Fact Sheet and provide full contact information for that person (cell, work phone, emails), such that we will be able to reach him/her on short notice if necessary. Given the large number of potential group members, it is crucial that You provide us with timely updates on contact information for Your designated representative.

5. Fees and Charges. If Formation is achieved, we will undertake this representation on the following special terms related to our attorneys' fees:

(a) Costs. You will agree to pay Your pro rata share of this firm's costs related to the prosecution of the Group Appeals (pro rata based upon number of clients, not amount in dispute). Costs include filing fees, copying fees, travel expense, facsimile and messenger fees, etc.; costs do not include attorneys' fees. To ensure that such costs are paid, we will ask for an initial Cost Deposit of \$500 for every distinct hospice provider number at issue (regardless of whether there are multiple years in question for same provider). We will only apply these deposits to our expenses. If we

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need additional funds for costs, we will bill You as necessary. (In prior group litigation, the initial \$500 / per provider deposit proved sufficient to cover costs without any further request over more than 3 years of work.)

(b) Attorneys' Fees. We will track our attorneys' fees for partners, associates, and paralegals. We will bill at rates of \$550 for myself or other partners, \$400 for associates at the firm, and \$225 for our paralegal. Although we will keep track of these fees, we will not expect You to pay any portion of them on an hourly basis except as set forth in section 9 below. You agree to pay the following alternative fees:

(1) Initial Fee. You agree to pay as an initial fee the greater of the following sums: (i) \$2,000.00; or (ii) ten percent of the amount of your total sequestration dollars for any cap accounting year in question (e.g., if 2013, then 11/1/12-10/31/13) (as reported on the PS&R summary report or cap calculation table for 2013). This initial fee along with the cost deposit is due when You return this signed engagement letter and Minimum Documents. If you receive any subsequent cap demands that also include sequestration (e.g., FY 2014) after you have already signed up, then further initial fees per above (but no additional costs) will be calculated and payable.

(2) Percentage of Net Benefit, Net of Costs and Initial Fee. A further amount equal to twenty-five percent (25%) of Net Benefit to You (defined below) to be reduced by: (i) Your Initial Fee (paid) and (ii) any actual recovery of costs or fees allocable to your Hospice. Your full obligation to us for fees (excluding costs) will not exceed \$30,000.00 per provider regardless how many years are at issue. (In prior cases, we recovered some fees and costs from HHS as part of settlement or judgment in certain actions.)

(3) "Net Benefit" means any or all of the following: (i) reduction in the aggregate principal repayment amount due to Medicare under current sequestration policy from such provider, including the amount of sequestration reportable as revenue for any cap year determined by self-reporting (whether included in the reported revenue by Hospice or not) or demand from contractor prior to the conclusion of our work; and/or (ii) the reasonable net present value of interest rate concessions by Medicare on repayment plans; and/or (iii) the net present value of any deferral of repayment obligations; and/or (iv) the net present value of any credit to a repayment demand made by crediting prior interest payments made by the Hospice toward a principal repayment obligation. A Net Benefit may occur in any of the following ways: (i) through interim or final victory in court in litigation with HHS; (ii) through compromise with HHS related directly to the litigation; or (iii) through any other compromise or concession on the repayment demands at issue, whether through legislation, regulation, policy change or other plan or agreement.

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(4) Timing of Payment. If the Net Benefit is realized in the form of a refund or other payment by HHS to You, then any fees will be due and payable immediately upon receipt of such value. If the Net Benefit is realized in terms only of a reduction of future or potential amounts owing, a credit, or interest savings of some kind, then fees payable in such circumstances may be paid pro rata over a suitable amount of time not to exceed six months without interest, so long as such payments are made timely. If Your payments are untimely, then we reserve the right to charge interest on such amounts at the rate of ten percent (10%). You may have both types of Net Benefits (i.e., immediately monetized and future savings).

(5) It may be possible that we may recover some of these fees, either under the Equal Access to Justice Act (28 U.S.C. § 2412(d)) or in a negotiated settlement with HHS. If any fees are recovered from HHS, then such recovered fees will either be credited to any outstanding fees or, if already paid in full by the Hospice, then distributed to the Hospice in proportion to its percentage allocation of overall fees. The possibility of future fee recovery shall not constitute grounds to defer Your obligation to pay us fees when otherwise due.

6. Negotiable Fee. You acknowledge that the above fee arrangement is not set by law, but is negotiable between attorney and client.

7. Lien. You hereby grant us a lien on any and all claims or causes of action that are the subject of our representation under this agreement. Our lien will be for any sums owing (or to become owing to us) for any unpaid costs, or attorneys' fees. The lien will attach to any recovery You obtain, whether through judgment, settlement, or otherwise.

8. Conflicts with Other Clients. Sheppard, Mullin, Richter & Hampton LLP has many attorneys and multiple offices. We may currently or in the future represent one or more other clients (including current, former, and future clients) in matters involving the Hospice. We undertake this engagement on the condition that we may represent another client in a matter in which we do not represent the Hospice, even if the interests of the other client are adverse to the Hospice (including appearance on behalf of another client adverse to the Hospice in litigation or arbitration) and can also, if necessary, examine or cross-examine Hospice personnel on behalf of that other client in such proceedings or in other proceedings to which the Hospice is not a party *provided* the other matter is not substantially related to our representation of the Hospice and in the course of representing the Hospice we have not obtained confidential information of the Hospice material to representation of the other client. By consenting to this arrangement, the Hospice is waiving our obligation of loyalty to it so long as we maintain confidentiality and adhere to the foregoing limitations. We seek this consent to allow our Firm to meet the needs of existing and future clients, to remain available to those other clients and to render legal services with vigor and competence. Also, if an attorney does not continue an engagement or must withdraw therefrom, the client may incur delay, prejudice or additional cost such as acquainting new counsel with the matter. Finally, we may have occasion to seek legal advice about our own rights and responsibilities regarding our

engagement by the Hospice. We may seek such advice from attorneys in our internal Office of the General Counsel who do not do work for the Hospice or from outside attorneys at our own expense. You agree that any such communications and advice are protected by our own attorney-client privilege and neither the fact of any communication nor their substance is subject to disclosure to You. To the extent that we are addressing our own rights and responsibilities, a conflict of interest might be deemed to exist between us and the Hospice, particularly if a dispute should arise between us. The Hospice hereby consents to such consultation occurring and waives any claim of conflict of interest based on such consultation or resulting communications that would otherwise disqualify us from continuing to represent the Hospice or from acting in our own behalf, even if doing so might be deemed adverse to the interests of the Hospice.

9. Termination of Representation. You may terminate this agreement with the Firm at any time upon written notice to the Firm in which event the Firm will immediately cease work on Your behalf. After Formation, as defined above, the Firm may withdraw from representation of the Hospice either with the Hospice's consent or upon court approval. In all such events, Hospice shall promptly deliver to the Firm a signed substitution of counsel form and shall pay all unpaid costs. If the Firm is discharged by You after Formation, the Firm shall be entitled immediately to reasonable attorneys' fees determined upon the following factors: (a) the status and prospects for and amount of any Net Benefit as defined above; (b) time expended by the Firm prior to termination valued at the rates set forth above; (c) the level of skill and experience brought to this matter by the Firm; (d) whether the termination was motivated by reasons other than the merits of the Group Appeal; and (e) the ultimate result achieved, even if after our termination. In no event will such reasonable fees exceed fifteen percent (15%) of the potential Net Benefit. Unless we agree to render other legal services to the Hospice, our representation will terminate upon completion of the Group Appeal. That will be the case whether or not, as is not uncommon, we are designated to receive copies or courtesy copies of notices under one or more resolution documents related to the Group Appeal.

10. Our Document Retention. It is our policy and practice to destroy our files ten (10) years after the file is first closed unless the client requests a shorter or longer retention period in writing. Files are generally closed at the conclusion of a lawsuit or completion of a transaction.

11. No Warranties. The hospice cap is by its nature difficult to manage. It is not possible to warrant a successful result or represent that a particular result can be obtained within a given time framework. We appreciate the Hospice's awareness of this issue. You acknowledge that we have not made any representations, promises, warranties or guarantees to You, express or implied, regarding the outcome of Your hospice cap position.

12. Arbitration, Choice of Law and Forum. Arbitration has the potential to provide a more timely, more economic and more confidential resolution of any dispute between us. Any dispute between us concerning our fees or charges shall, if you so elect, be submitted to arbitration under the rules of the State Bar of California ("the Rules"), and shall be binding if (i) each of us so agrees after any such dispute arises, or (ii) such arbitration becomes binding

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under the Rules. Any dispute between us concerning our fees or charges not so submitted to binding arbitration under the Rules, or that remains unresolved after non-binding arbitration under the Rules and any other dispute between or among the Hospice and us or any of our attorneys and agents, including but not limited to claims of malpractice, errors or omissions, the scope or applicability of this agreement to arbitrate or any other claim of any kind regardless of the facts or the legal theories, shall be finally settled by mandatory binding arbitration in Orange County, California, with each party to bear its own costs and attorneys' fees and disbursements. The Arbitration shall be administered by JAMS pursuant to its Comprehensive Arbitration Rules and Procedures, except that notwithstanding anything to the contrary in the JAMS rules, full discovery shall be permitted as allowed by California Code of Civil Procedure section 1283.05. The arbitration shall commence when any party serves a demand for arbitration on the other party. Any arbitration hereunder, and all submissions, testimony, transcripts, evidence, etc., related to such arbitration, shall be kept confidential by all parties. Such arbitration shall be conducted before a single arbitrator, except in matters involving a dispute greater than One Million Dollars (\$1,000,000), which shall be conducted before a three-arbitrator panel. The Arbitrator(s) shall be appointed according to the JAMS rules. All arbitrators shall serve as neutral, independent and impartial arbitrators and must act in conformity with the rules of evidence and law. Judgment on a binding arbitration award may be entered in any court of competent jurisdiction. *We mutually acknowledge that, by this agreement to arbitrate, each of us irrevocably waives our rights to court or jury trial. The Hospice has the right to consult separate legal counsel at any time as to any matter, including whether to enter into this engagement letter and consent to the foregoing agreement to arbitrate.* The Hospice agrees that this agreement will be governed by the laws of California without regard to its conflict rules provided that nothing herein shall limit the full applicability of the Federal Arbitration Act. The foregoing arbitration provision shall not preclude parties from seeking provisional remedies in aid of arbitration from a court of appropriate jurisdiction. Subject in all cases to the arbitration provision set forth herein, the Hospice agrees that (i) with regard to the courts, exclusive jurisdiction and exclusive venue for any dispute between us shall lie solely with the California Superior Court for the county named above as the site for arbitration and the corresponding U.S. District Court and (ii) consents to service of process pursuant to the applicable California state statutes and federal rules.

If the foregoing is an acceptable basis for our engagement as counsel, I would appreciate it if You would sign a copy of this letter on behalf of the Hospice and return it to us along with the Hospice's cost deposit and Minimum Documents defined above.

You have the right to consult independent counsel before signing this letter and to take such time as you need to seek such advice.

If you have any questions or concerns, please call.

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Once again, thank you for considering us to represent You in this matter.

Sincerely,



Brian M. Daucher
for SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

SMRH:436563777.1

The undersigned has read and understands this engagement letter and agrees that it correctly sets forth the terms upon which Sheppard, Mullin, Richter & Hampton LLP has been engaged by the undersigned Hospice in connection with the representation described herein and has waived any conflict of interest on the part of this Firm arising out of the representation described above.

Dated: _____

By: _____
(name)

(title)

ATTACHMENT A

ADMINISTRATIVE CHARGE TABLE

(As of January 1, 2015)

For your information, the following is a current list of the various costs that are charged to clients.

<u>Category</u>	<u>Charge</u>
Delivery (DHL, Federal Express, messenger etc.)	Invoiced cost; not reduced by any volume discounts.
Document imaging (Scanning, OCR, Coding)	Invoiced cost.
Duplicating	\$0.25 per page; color copies \$0.75.
Lexis/ Westlaw Legal research	Ten Percent (10%) off of Vendor Standard Rates.
Postage	Actual cost of mailings over \$5.00 per day.
Telephone	
Local calls	No charge
Long distance calls within U.S. and Canada	\$0.10 to \$0.15 per minute
Other international calls	Firm's estimated cost
Travel	Actual Cost.